Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1994

FRED WILLIAM WORRELL, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

On Petition for Writ of Certiorari

to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

Law Offices of George A. Boyle
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2 pp

1. Where the evidence revealed that counsel for the petitioner was so indifferent to his representation that he obtained neither the criminal complaint or the police reports, was it error for the trial court to deny his motion to withdraw his plea of no contest?

2. Can the petitioner be deemed to knowingly, intelligently, and voluntarily enter a plea of no contest in matters where it is established that his counsel was unprepared because of his failure to obtain even the criminal complaint?

Parties to the Proceedings Below

All parties appear in the caption of the case in the United States Supreme Court.

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Opinions Below

A true and correct copy of the unpublished opinion of the California Court of Appeal, Fifth Appellate District, is included in Appendix A hereto.

Jurisdiction

The judgment, included in Appendix A, which the petitioner seeks to have reviewed was filed on March 31, 1994.

Review in the California Supreme Court was denied on June 22, 1994. A true and correct copy of the court's order is attached hereto as Appendix B.

The jurisdiction of this Court is invoked under Title 28, section 1257, subdivision (a), of the United States Code.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides that an accused have the "Assistance of Counsel for his defence." This Court has held that the right to assistance of counsel and the right to the effective assistance of counsel are constitutional equivalents. (*Powell v. Alabama* 287 U.S. 45, 53, [53 S.Ct. 55, 77 L.Ed.158] (1932).)

"Defendant bears the burden of proving ineffective assistance of counsel (citation). To establish constitutionally inadequate representation, the defendant must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defense to prejudice, i.e., there is a reasonable probability that but for counsel's failings the result would have been more favorable. (Citations.) When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' (citation), the contention must be rejected." (*People v. Jackson* (1989) 49 Cal.3d 1170, 1188.)

"Counsel . . . has the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. (Citation.)" (*Strickland v. Washington* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 [1984].)

"A fair assessment of attorney performance requires that every effort be made . . . to evaluate the conduct from counsel's perspective at the time." (*Strickland v. Washington, supra,* 466 U.S. at 689.) "When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner

challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' (citation), the contention must be rejected." (*People v. Jackson, supra,* 49 Cal.3d at 1188.)

Statement of the Case

The petitioner was originally charged with violating the Health & Safety Code by allegedly possessing methamphetamine for sale and for maintaining an establishment for manufacturing, distributing and storing contraband. In addition, it was alleged he was part of a conspiracy to violate the drug laws. Enhancements for allegedly being a principal armed with a weapon were included in the criminal complaint.

After entering a plea of not guilty at arraignment, the petitioner entered a plea of no contest. At the preliminary examination, he entered a plea of no contest to possession for sale of methamphetamine. The conspiracy charge and the allegation of maintaining an establishment were dismissed. The enhancement for alleging he was an armed principal was stricken.

The petitioner appeared in the superior court for sentencing. He moved the court for an order allowing him to withdraw his plea. The motion was granted and the matter was remanded to the municipal court for further hearing. By this time, petitioner had different counsel.

A formal written motion was filed and formally opposed by the prosecutor. The key issue was whether the petitioner's former counsel had rendered ineffective assistance of

counsel at the plea negotiation and subsequent entry of the plea of no contest. The motion was heard in the municipal court and witness testimony was presented. At the conclusion of the hearing, the motion was denied and sentencing in the superior court rescheduled.

The petitioner was sentenced to state prison for a term of two years. He applied for and was granted a certificate of probable cause. A timely notice of appeal was filed.

The matter was briefed before the Court of Appeal resulting in the unpublished decision set forth in Appendix A.

One witness testifying at the hearing on the motion to withdraw the plea had known the petitioner for 20 years. He was present at the petitioner's arraignment and during a conversation between the petitioner and his counsel. Counsel inferred that the preliminary examination would be a *pro forma* matter. However, a motion to disclose an informant would be made. The witness was out of state when the petitioner entered his plea. Meeting with the petitioner on his return, the petitioner appeared upset to a degree not known by the witness in his long association with the petitioner.

The petitioner informed the witness he felt pressured into taking the negotiated plea. The petitioner's wife, in tears, was with him at that time. He felt abandoned by his counsel whom, he also felt, had forced him into the negotiated plea too quickly.

The petitioner testified at the motion to withdraw his plea. He had, upon arrest but before arraignment, contacted counsel and,

within a few days after that, retained him. The conversation with counsel before retaining him did not include discussion of felony criminal proceedings.

The petitioner next saw counsel at arraignment. Discussing the strategy of the proceedings, counsel told the appellant he would be making a motion in the superior court since the preliminary examination was merely a stepping stone to the superior court where necessary motions could be made. The petitioner was not informed by counsel of the possibility of a negotiated plea at the preliminary examination. Counsel requested the petitioner to contact him on a certain day.

On the designated day, the petitioner left a message on counsel's answering machine. Four days later, having received no return call, the petitioner contacted counsel's office again. After several aborted attempts to speak with counsel, the petitioner was told that counsel would be at the petitioner's home that afternoon.

The petitioner met with counsel only four times including the court appearances. Counsel never showed the petitioner any police reports nor did he discuss the contents of any reports with him. The petitioner was unaware the charges including a weapons enhancement. He did not read the criminal complaint.

Arriving about one hour late for the appointment, counsel attempted to placate the petitioner by telling him there was nothing to worry about. During the meeting, the petitioner informed counsel of several facts concerning the criminal matter and was assured that a private investigator would be hired to verify those

facts.

On the day of the preliminary examination, the petitioner saw counsel pass him several times as he sat waiting for the court proceeding to commence. About 2 hours later, counsel contacted the petitioner in the courtroom. The petitioner was accompanied by his wife.

Counsel told the petitioner he had obtained a deal on the case. If the petitioner were to plead guilty to possession of methamphetamine with the intent to sell, the petitioner's wife (a co-defendant) would be granted diversion and serve no time in jail. The defendant so vehemently expressed his annoyance that counsel asked him to leave the courtroom.

The petitioner, his wife and counsel continued the discussion in the hallway. The wife's attorney was not present. In the next five to ten minutes, the petitioner was informed by his counsel that, if he refused the deal, the petitioner's's wife would also go to jail. Expressing the desire for some time to consider the matter, the petitioner was told that time was an unavailable commodity. The conversation took no more than 10 minutes.

This was, however, time enough for the petitioner's wife to become overwrought and to start weeping. During this time, a deputy district attorney and a probation officer came to where the three were standing. In the presence of the petitioner and his wife, they informed the petitioner they were considering adding another charge which would mean that the petitioner's wife would serve time in the state prison.

The petitioner and his wife, when alone,

were told by a co-defendant that counsel had approached him and suggested that the co-defendant tell the petitioner to take the deal, adding that it was "the best he [was] going to get." Counsel then came to where the petitioner was and informed him that he had to make up his mind -- time had run out. The petitioner felt this was another attempt to pressure him into a premature decision. The petitioner stated at the hearing that he only found out about the negotiated plea just before noon on the day of his preliminary examination. He understood nothing about the terms of the bargain.

The co-defendant testified he had heard several conversations between the petitioner and counsel. He witnessed the agitated state of the petitioner occasioned by counsel's news of the negotiated plea. He witnessed the sobbing of the petitioner's wife.

The petitioner's wife testified she was present during the discussion between the petitioner and counsel. Having been married to the petitioner for seven years, the petitioner's behavior on the day of the preliminary examination was not usual. In fact, when the petitioner reentered the courtroom for the taking of his plea, he appeared to have a blank expression on his face.

The petitioner's wife confirmed that other persons had talked about more charges. Someone suggested to her that she speak to the petitioner in an effort to get him to accept the deal since it would a lesser sentence for her. She did so.

Counsel, a 19 year veteran of the bar, testified for the prosecution at the hearing. At the first meeting between counsel and the

petitioner, counsel was told the petitioner had read the report. A retainer fee was agreed upon. The meeting lasted 45 minutes.

At an office meeting, the police reports were discussed. The petitioner was to prepare something in writing for counsel, which he subsequently did. No investigator was hired and counsel interviewed no one but the petitioner in connection with the case.

Regarding the preliminary examination, counsel informed the petitioner that this would basically be a discovery procedure for the defense and that no motions would be made nor any witnesses called. The petitioner was informed of the possibility of making certain motions in the superior court. Counsel told the petitioner that, more than likely, an offer to settle would be made at the preliminary examination. The petitioner informed counsel of his lack of interest in entering a plea.

The next meeting, which occurred before the preliminary hearing, was at the petitioner's home. The meeting lasted for perhaps one hour. There was some discussion about the informant and the possibility of making a motion to disclose the informant's's identity at the superior court level. Counsel was shown the places in which the contraband was found. The petitioner gave his notes to counsel. This was the first meeting between the two since the arraignment and occurred the day before the preliminary hearing.

On the day of the preliminary hearing, counsel had no other appearances to make. On counsel's late arrival, the prosecutor informed him of the offer to settle. After discussing it with the petitioner, he noted the distraught

condition evoked by the offer. He was present when the petitioner discussed the offer with his wife. She made it clear she would like him to take the deal.

Counsel could not recall the prosecutor who appeared for the People. He had a discussion with the petitioner about the informant. The petitioner acquiesced in having his wife present during the discussions of that day.

The discussion lasted about 45 minutes. The petitioner did not like the offer and informed counsel he did not want to take it. While not pressuring the petitioner, counsel did tell him the offer would not improve with age or level of court.

Counsel's file contained no notes regarding any conversations with the petitioner. He had no notes regarding the legal implications of the matter. Since he believed the petitioner had all the police reports, he made no effort to obtain any from the prosecutor's office. While counsel had a copy of the criminal complaint, he did not know how he obtained it or whether he discussed the charges with the petitioner.

The facts stated above were those elicited during the hearing on the motion to withdraw the plea. On these facts, the municipal court judge denied the petitioner's motion.

Reasons for Allowance of the Writ

The California Fifth District Court of Appeal did not direct any attention to the indifferent attitude of the petitioner's counsel. Counsel obtained no police reports, relying on his stated reason that he believed the petitioner had them. This might be fine if

the petitioner was an attorney and could tell counsel the legal implications of what was contained in the reports. He was not an attorney and could not do so.

Counsel was presented by the petitioner with several pages of facts which the petitioner, at counsel's request, had drawn up. Counsel took no apparent action since he did not even retain the services of a private investigator.

Counsel's attitude permeated all aspects of his representation of the petitioner. He was even late to the one court proceeding calendared although he had no other engagements in court that day. By his own admission, he did not even have possession of the charging document.

The Court of Appeal focussed on the discussions counsel had with the petitioner prior to the day on which the plea was entered. The Court overlooked the fact that counsel was not prepared to participate in those discussions since he did not obtain the basic working tools of a criminal defense attorney, i.e., the complaint and the police reports. It is not the fact that discussions were had but the meaningfulness of those discussions regarding the legal representation of the petitioner.

The municipal court judge also focussed upon the wrong facts. The question before her really was: can the petitioner knowingly, intelligently, and voluntarily enter a plea to a criminal charge when he has been advised by counsel who was not himself in possession of the facts of the matter? If the petitioner is to make a decision to enter a plea or not, he should be presented the alternatives and defenses available to him by counsel who is

fully informed.

The standard of performance, exhibited by counsel's own admissions, indicates performance at a lesser standard than is permitted under the law.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

DATED:

S/

DEAN J. MILLER
Counsel for petitioner.

APPENDIX A

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
March 31 1994
KEVIN A. SWANSON, Clerk
By: _____
Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE Plaintiff and Respondent v. FRED WILLIAM WORRELL, Defendant and Appellant.	F019386 (Super. Ct. No. 50880) OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Sharon Mettler and John I. Kelly, Judges.

George A. Boyle and Dean J. Miller for Defendant and Appellant.

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* Before Martin, Acting P.J., Vartabedian, J., and Thaxter, J.

Judge Mettler denied defendant's motion to withdraw plea; Judge Kelly sentenced defendant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Roger E. Venturi and Gregory W. Baugher, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Appellant Fred William Worrell pleaded no contest to violation of Health and Safety Code section 11378, unlawful possession of methamphetamine with intent to sell. This case arose from police officers finding (while executing a search warrant) methamphetamine under the hood of appellant's pickup truck and cocaine and methamphetamine in the Bakersfield home appellant shared with his wife and others. drug packaging material, scales, a pager, and firearms were among the other items produced by the search. Appellant received the benefit of his plea and sentence bargain: other charges and enhancement allegations were dismissed, and he was sentenced to the two-year middle prison term.

Prior to sentencing, appellant, assisted by different retained counsel than had previously represented him, moved to withdraw his plea under Penal Code section 1018. The motion was denied by the municipal court judge who had entered the plea. The matter was then returned to superior court for sentencing.

Appellant now claims the municipal court abused its discretion in denying his motion to withdraw plea. We disagree and reaffirm the judgment.

DISCUSSION

The motion to withdraw plea should have

been granted, asserts appellant, because his attorney misinformed him and acted unethically, and his wife and others unduly pressured him

Penal Code section 1018 states in part: "On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted[] . . . This section shall be liberally construed to effect these objects and to promote justice."

"The California Supreme Court has held that the burden of proof necessary to establish the good cause standard in a prejudgment motion to withdraw a guilty plea pursuant to Penal Code section 1018 is by clear and convincing evidence. (People_v. Cruz_(1974) 12 Cal.3d 562, 566 . . .)" (People__v. Nance__(1991) 1 Cal.App.4th 1453, 1456.)

The denial of a motion to withdraw a guilty or nolo contendere plea will not be reversed unless the defendant clearly demonstrates an abuse of discretion. (People_v. Superior_Court (Giron) (1974) 11 Cal.3d 793, 796.)

Regarding his initial attorney's performance, appellant testified at the hearing on his motion that the attorney, William Cater, never discussed the case with him and merely told him to not worry about the preliminary hearing because it was just a "stepping stone" to superior court, where most of the defense work would be done; nothing was said about the possibility of a plea bargain in municipal court. According to appellant, once the prosecution offered the deal, Cater told him this would be his only chance to get a plea bargain.

Appellant claimed he felt pressured not only by the limited time he was allowed to consider the plea offer, but also by the presence of his codefendants, his friend Phil Sanders and his wife. Even though he never wanted to admit any of the charges, appellant wanted the prosecution to go easy on his wife; by changing his plea, she would be allowed to attend diversion classes.

Additionally, he testified that Sanders told him that Cater instructed Sanders to personally urge appellant to accept the deal. Sanders testified likewise.

According to appellant, he felt "fuzzy" when he entered his plea. In her testimony, his wife described appellant as "kind of blank."

By contrast, Cater testified that he had numerous discussions with appellant prior to the day of the preliminary hearing. He explained to appellant that the prosecution's standard procedure was to make plea offers at the preliminary hearing; if no deal was reached, the hearing would help the defense to discover facts.

Cater noted he conveyed to appellant the prosecution's offer as soon as he received it, and he fully explained the nature of the charges and possible penalties. He did not ask Sanders to talk to appellant. He was satisfied by the questions appellant asked him that appellant understood what was going on. Appellant did not object to his wife's presence during these discussions. Cater recalled appellant's general displeasure about changing his plea. While the decision had to be made the same day of the offer, the court allowed additional time for appellant to discuss the matter with Cater.

At the conclusion of the extensive Penal Code section 1018 hearing (consisting of 162 pages of transcript), the municipal court judge denied the motion, stating: "Appears to me the burden of proof has not been met, that this plea was entered as a result of duress or other illegally, impermissible basis." The judge had already noted that the transcripts of the plea proceeding demonstrated repeated responses by appellant indicating that he acted knowingly, freely, and voluntarily.

We are satisfied the court did not abuse its discretion in denying the motion. We note that the comments made by appellant at the plea hearing hardly seem like the words of a person suffering from "fuzzy" or "blank" mindedness. His response that he was acting knowingly, intelligently, and voluntarily after discussing the matter with his attorney indicate no equivocation. Additionally, he was able to articulate intelligent questions of the court. When the court asked whether he understood the right to not incriminate himself, a right he would be giving up by pleading no contest, appellant initially responded, "I'm incriminating [myself] without admission of guilty. Is that what you are saying?" Later in the proceeding, when informed of his obligation to register as a narcotics offender, he asked, "Excuse me, is that a local agency?" In short, the plea transcript is consistent with Cater's testimony at the later hearing; the court's ruling finds sufficient support.

In People v. Caruso (1959) 174 Cal.App.2d 624 the defendant based his motion to withdraw his guilty plea largely "on the mental and emotional strain that he was under at the time he pleaded guilty." (Id. at p. 637.) The appellate court, in affirming the denial of the

motion, found, "The circumstances revealed by the record are wholly inconsistent with the claim that the plea was not the product of [defendant's] free will and judgment. The question whether [defendant's] plea was a product of overreaching was a question for the trial court to resolve. [Citations.]" (Ibid.)

As to whether Cater's performance as counsel required the court to withdraw the plea, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (People v. Bunyard (1988) 45 Cal.3d 1189, 1215.) Based on our preceding analysis, we cannot say appellant overcame this presumption in the court below.

The municipal court did not abuse its discretion in denying appellant's motion.

DISPOSITION

The judgment is affirmed.

APPENDIX B

IN SUPREME COURT
FILED
JUN 22 1994

Fifth Appellate District No. F019386
S039760

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

FRED WILLIAM WORRELL, Appellant

Appellant's petition for review DENIED.

s/LUCAS
Chief Justice